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94-173

No. 94-193

Supreme Court, U.S.
FILED
OCT 11 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

CARL DIXON,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition For Writ Of Certiorari To The Appellate Court Of Illinois

REPLY BRIEF OF THE PETITIONER

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INTRODUCTION

The State adeptly has invoked two of the primary tools used by those who seek to persuade this Court to deny petitions for certiorari. First, the State argues that the decision below was based upon an independent and adequate state ground. Second, the State claims that the factual pattern of this case is peculiar in a way that makes it unsuited for certiorari. As will be seen, though, neither of these arguments has any merit. This case squarely presents a significant federal constitutional question that has been the subject of conflicting resolutions by lower federal and state courts. It plainly meets this Court's criteria for certiorari, and the Court should not forego the opportunity to resolve the question presented and to remedy the constitutional wrong that led to Mr. Dixon's conviction.

I. MR. DIXON'S CONFRONTATION CLAUSE CLAIM WAS DECIDED ON ITS MERITS, NOT ON THE BASIS OF ANY INDEPENDENT AND ADEQUATE STATE GROUND.

There is no need for much response to the State's contention that the decision of the court below was supported by an independent and adequate state ground. Contrary to the State's assertion, Mr. Dixon's Confrontation Clause claim was plainly rejected on its merits – on the basis of the Illinois court's understanding of this Court's Confrontation Clause decisions. The decision of the court speaks for itself on this point:

> Next, defendant submits that Carlisle's invocation of his fifth amendment privilege

> against self-incrimination, when asked about the prior inconsistent statement, made him unavailable for cross-examination violating the Confrontation Clause of the sixth amendment. In view of our previous discussion, this issue fails to warrant much attention.
>
> "The Confrontation Clause guarantees only 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' " (*United States v. Owens* (1988), 484 U.S. 554, 559, 108 S.Ct. 838, 842, 98 L.Ed.2d 951, 957-58; *see People v. Flores* (1989), 128 Ill.2d 66.) As defendant had the opportunity to cross-examine Carlisle, his right to confront witnesses was not violated. (App. 10)

Nowhere, in this discussion is there any mild hint, much less the "plain statement" required by *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983), that this decision is based on some state law procedural ground. See generally *Harris* v. *Reed*, 489 U.S. 255 (1989).

The Illinois court may or may not have invoked some state law limitation on Mr. Dixon's right to raise his state-law objection to the admission of the out-of-court statements (see State's Br. at 10-11), but the Illinois court most clearly addressed Mr. Dixon's federal Confrontation Clause claim and rejected it based on its reading of *People* v. *Owens*, 484 U.S. 554 (1988) (no Confrontation Clause violation where the witness claimed lack of memory about the out-of-court statement) and *People* v. *Flores*, 128 Ill. 2d 66, 88, 538 N.E.2d 481, 489 (1989) (interpreting *Owens* to hold that "a gap in the witness' recollection concerning the content of a prior statement does not necessarily preclude an opportunity for cross-

examination"). There can be no questioning this Court's jurisdiction to review this decision.[1]

II. THIS CASE SQUARELY PRESENTS AN IMPORTANT ISSUE THAT HAS BEEN THE SUBJECT OF A CONFLICT AMONG THE LOWER COURTS.

Aside from its ill-fated attempt at identifying an independent and adequate state ground for the decision below, the State has also resorted to the second tool of those who oppose petitions for certiorari: the State argues that no matter how unfair and unjust the result in this case, certiorari should be denied because the fact pattern of the case is somehow peculiar. The State points to this supposed "peculiarity" on dozens of occasions in the course of its brief, arguing that the facts of this case may prevent this Court from resolving the conflict among the lower courts and from pronouncing a sufficiently broad principle of law. See State's Br. at 6, 7, 8, 9, 11, 16, 19, 24, 25. The Court should not be misled by the State's attempt to marginalize the importance of this case or the extent to which it cleanly presents an important issue of constitutional law.

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[1] In any event, even if the court had relied on an "independent" state law justification for rejecting Mr. Dixon's claim, that ground would not be "adequate" given the Illinois court's decision in *People* v. *Yarbrough*, 166 Ill. App. 3d 825, 831, 520 N.E.2d 1116, 1120 (5th Dist.) *appeal denied*, 121 Ill.2d 585, 526 N.E.2d 839 (1988), which held that a defendant need not call a witness for cross-examination in order to argue on appeal that the witness was unavailable. See generally *Ford* v. *Georgia*, 498 U.S. 411, 424 (1991) (in order to be considered "adequate" a state procedural rule must be "firmly established and regularly followed").

The sole support for the State's argument that Mr. Dixon's claim arises in a "peculiar" way is the State's contention that there was no pattern to Christopher Carlisle's assertion of his Fifth Amendment privilege. The State would have this Court believe that Carlisle randomly asserted the Fifth Amendment when the spirit moved him, and that the trial court generously indulged Carlisle by allowing him to arbitrarily decide what questions not to answer. If this were, in fact, the case, we would readily concede that the defense would have been duty bound to call Carlisle to the stand to see if he would opt to answer the vital questions about his out-of-court statement that the defense needed to pose. The fact is, though, that the State's description of Carlisle's testimony is patently inaccurate.

There was an obvious and definite pattern to when Carlisle sought to, and was allowed to, invoke his Fifth Amendment right. Carlisle answered *all* questions posed to him about every subject except for his May 12 out-of-court statement. To begin with, he answered *all* questions put to him about his relationship with the victim and the defendant. Tr. A56-58. The prosecutor then began to ask Carlisle about what he saw on the morning of May 12, when the victim was killed. Carlisle initially sought to invoke the Fifth Amendment to these questions, but when the trial court ordered Carlisle to answer the questions, Carlisle answered *all* questions put to him on this subject. Tr. A58-61. The only questions that Carlisle did not answer were those relating to the May 12 statement he had made to the State's Attorney. As for these questions, Carlisle refused to answer *each and every* question relating to the statement and the judge ruled that Carlisle

had the right to invoke his Fifth Amendment right with respect to *each and every* such question. Tr. A61-65.

The pattern of Carlisle's succe ul invocations of the Fifth Amendment was indisputable and made perfect sense. Carlisle testified at trial that he did not see who killed Patrick Marshall. Tr. A59. Forcing him to answer questions about the false statement that he had given to the authorities on May 12 would have been forcing him to incriminate himself, by admitting to have committed perjury when he gave that false statement. The trial court recognized this and consistently allowed Carlisle to refuse to answer *all* questions relating to the May 12 statement – the statement that would ultimately serve as the sole evidence relied upon by the trial court to convict Carl Dixon.

It is nonsense, then, for the State to suggest that it was unpredictable whether Carlisle would invoke his Fifth Amendment right if asked about his May 12 statement on cross-examination.[2] It plainly would have been futile for the defense to ask Carlisle questions about this statement, after he already refused to answer *all* questions put to him on that statement. Yet, this was the only

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[2] Without any support in the record, the State makes the bizarre claim that "Carlisle did not really fear self-incrimination but was actually refusing to cooperate with the prosecution because he wanted to help petitioner get an acquittal. Therefore, the record shows that it is entirely possible that Carlisle would have answered whatever questions defense counsel might have put to him at trial." Brief in Opp. 16. The fallacy of this claim is apparent: had Carlisle been interested in helping the defendant he would have readily admitted on direct examination that he lied to the authorities when he made his May 12 statement.

subject about which the defense needed to cross-examine Carlisle. True, as the State claims, the defense could have cross-examined Carlisle about many subjects besides Carlisle's May 12 statement. But the defense had no need or desire to cross-examine Carlisle on those matters, none of which were damaging to the defendant. The only subject about which the defense needed to cross-examine Carlisle related to the May 12 statement, and this was the very subject about which Carlisle was unambiguously and successfully invoking his right against self-incrimination. See Pet. for Cert. 24 n.9.

This case, therefore, squarely presents the question that we asked this Court to decide in our Petition for Certiorari. This case presents, in a vivid manner, the question of "[w]hether a witness who repeatedly and successfully invokes his Fifth Amendment right and refuses to testify about an out-of-court statement when questioned by the prosecution on cross-examination is 'available' for cross-examination by the defendant, as required by the Confrontation Clause of the Sixth Amendment." Pet. for Cert. i. This case gives the Court the opportunity to settle the issue that has divided the lower courts[3] and to decide whether a witness is

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[3] In our Petition for Certiorari we described many cases in which courts have divided on whether a witness can be unavailable for examination even in the absence of the witness's formal invocation of the Fifth Amendment upon questioning. The State's effort to dismiss the divergent results in these cases as "factbound" applications of a common rule is without merit. There is no common rule where one court states that "the confrontation clause does not require the futile act of calling [a witness] to the stand in open court to testify only to have him

"unavailable" when it is obvious that he will refuse to answer questions about the matter at issue, even if the defense foregoes the futile act of calling the witness to the stand to repeat his invocation of the Fifth Amendment.

Carl Dixon was convicted of murder, after a trial that cannot possibly be defended as fair. He was deprived of his right to attack the key piece of evidence against him – the very evidence that the trial court identified as the lone factor in the decision to find him guilty. Mr. Dixon urges this Court not to be misled by the State's efforts at minimizing the importance of this case.

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refuse" (*United States* v. *Adams*, 759 F.2d 1099, 1107 (3d Cir. 1985)) and another court states that a witness cannot be deemed unavailable unless she states "firsthand and in the court's presence that she did intend to refuse to testify in reliance on her fifth amendment privilege" (*United States* v. *Pelton*, 578 F.2d 701, 709 (8th Cir. 1978)). Similarly, as we explained (Pet. for Cert. 14), the fact that some of the cases we have identified deal with the "unavailability" inquiry under the rules of evidence does not, in any sense, diminish the importance of the conflict among the court. Nor does it lessen the significance of the opportunity that this case presents for this Court to provide guidance on this recurring issue.

CONCLUSION

For the reasons set forth above and in the Petition for Certiorari, petitioner respectfully request that this Court grant a writ of certiorari in this case, or, in the alternative, that the Court summarily reverse the judgment below.

Respectfully submitted,

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